rate that the offence shall continue up to the date of conviction because it is further punishable if continued after conviction. But the case of *Hull* v. *The London County Council*, (1901) 1 Q.B. 580 seems to me to weigh very strongly against this. Hull was convicted of an offence against a section of the London Building Act 1894 forbidding projections beyond the general line of buildings in a street. The projection was a wooden case attached to the external wall of the building by iron brackets and used as an advertisement sign. Bruce J. giving the judgment of a Divisional Court said at p. 589:—

> "Further as to point raised by the case whether the prosecution of the alleged offence is barred under s. 11 of the Summary Jurisdiction Act 1848 by lapse of time, we think it is. If any offence was committed it was, we think, complete on June 20th 1899—the date on which the said sign was completely affixed to the premises."

Similarly in *Marshall* v. *Smith*, 8 C.P. 416, the court pointed out that while continuing to build might be a continuing offence, the failure to destroy after the building was completed could not.

I think therefore that the deviation from the plan was a single offence which was complete when the intention of the accused to deviate was manifested by the overt act of ceasing work on the installation and that this is not a continuing offence so as to defeat the operation of s. 381. I think therefore that the Magistrate was right to acquit and I dismiss this appeal.

Mr. Walters has asked for costs, but I think I am bound by my decision in the case of *R.* v. *Mohamed Sudin*, 1935 S.S.L.R. 309 and that this appeal is clearly neither vexatious nor frivolous. I refuse therefore to award costs to Respondent.

Appeal dismissed.

Solicitors for Appellant—*Drew & Napier.*

Solicitors for Respondent—*Allen & Gledhill.*

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J.

January 29, 1938.

REX v. S. EBATA.

[SINGAPORE MAGISTRATE'S APPEAL No. 101 of 1937].

Merchandise Marks Ordinance (Cap. 157), s. 12—Importing goods marked with a counterfeit trade mark.

In 1927 a Singapore firm ordered goods from a Japanese manufacturer and later in the year cases of goods consigned by the manufacturer for the importer arrived in Singapore. The goods which arrived were 200 dozens men's socks which had not been ordered by the importer. This appeared on the invoice which was checked by the importer but he gave instructions to take delivery of all the goods. Subsequently it was found that these socks bore a trade mark which was the trade mark of an English hosiery firm in breach of the Merchandise Marks Ordinance. The District Judge convicted the appellant under s. 12 of the Merchandise Marks Ordinance and he appealed from the conviction.

Held, that by accepting the draft and accepting delivery of the goods which he knew he had not ordered the importer had ratified the action of the manufacturer and accepted the consignment and so became an importer.

Also held, that, though he could not take any reasonable precautions within subsection (a) of section 12, an importer, even where he does not obtain possession of the goods bearing the infringing mark, has no defence under subsection (c) of that section.

MAGISTRATE'S APPEAL.

Dr. Withers Payne for appellant.

Storr, Crown Counsel, for the respondent.

The facts and arguments appear sufficiently from the judgment.

MCELWAINE, C.J.—The appellant was convicted on the following charge:—

> "That he, on or about 25th October, 1937 at Singapore did import goods, to wit, cotton socks, to which a counterfeit trade mark had been applied and thereby committed an offence punishable under s. 12 of the Merchandise Marks Ordinance (Chapter 151)."

The facts alleged in the evidence are shortly as follows:—About the middle of July 1937, Ebata & Co., ordered goods from the travelling representative of Matsuoka & Co., of Tokyo. A copy of the order in Japanese characters and English figures was produced by the appellant. A translation of the document was not put in. The goods total Yen 4,997.36. It was stated that the socks were not ordered. I have had the copy of the order which was exhibited by the accused translated. It shews no order for socks.

On 25th or 26th October cases of goods consigned by Matsuoka & Co. to Ebata & Co. arrived in Singapore in the S.S. "Celebes Maru" and were brought to the Customs examination shed. Who brought them from the ship to the shed does not appear.

On 26th October appellant received from the bank a draft and an invoice exhibit "C." This invoice is in English throughout. It totals Y.2.668.48. Some of the items tally with those in the order, some goods in the order are not included, but some goods not in the order were included. Among the latter are two hundred dozen "Men's cotton and Ravon socks" costing Y. 640. No mention of any trade mark appears in the invoice and I understand Crown Counsel to agree that there was no trade mark on the outside of the cases in which the socks were contained.

On obtaining the invoice appellant checked it with the order and found that the socks were not ordered. However he gave instructions to take delivery of all the cases. He had to take

delivery of all or none because one draft covered the lot.

About noon on 26th October Inspector Nickels went to the customs examination sned where he saw two cases containing two hundred dozen white cotton socks with "Pelican" trade mark. He communicated with Ebata, and appellant went to Inspector Nickels' office with the invoice.

Evidence was given that the "Pelican" trade mark is the trade mark of an English hosiery firm, Arthur Kemp Ltd., of Leicester. I may say that the invoice concludes with the words "We certify that the above goods are made in Japan."

There is no express evidence as to who opened the boxes or as to who was present at the opening, but appellant says he got the invoice *before* the goods were seized and apparently the person to whom he gave instructions to take delivery was a coolie Ling An because this coolie told appellant of the seizure. It seems to me not unreasonable to infer that Ling An was sent with the Bill of Lading to take delivery of the goods, and that this same person in authority—perhaps acting under s. 6 of the Registration of Imports and Exports Ordinance (Cap. 41), opened the packages and found the offending socks and then communicated with the police.

I hope, that in future cases such facts, which may be material, will be clearly proved.

The learned District Judge convicted the appellant and fined him $500 or three months' rigorous imprisonment and ordered the socks seized to be forfeited.

The appellant appeals against the conviction and fine, not against the forfeiture. This point was not argued in the present case and therefore does not arise for decision but it would appear that by virtue of section 153 of the Customs Law Consolidation Act 1876 when goods have been imported into any British possession whether by an accused or by any one else the goods must be forfeited and no appeal lies under s. 25, sub-s. 2 or 3 of the Merchandise Marks Ordinance (Cap. 157) if the goods are of foreign manufacture and bear any marks being or purporting to be the marks of manufacturers resident in the United Kingdom.

The learned District Judge gives his grounds of judgment as follows:—

> "In these cases the accused often say the goods seized as offending against the Merchandise Marks Ordinance were sent to them unordered. That is what Ebata says in this case. He ought to have gone down to the wharf or sent a responsible person to inspect the said goods. The activities of Japanese and other persons in Japan in the matter of exporting goods bearing counterfeit trade marks or false trade descriptions are well known."

There is no doubt that these goods were imported into the Colony, but Dr. Withers Payne argues that the appellant did not import them as he did not order them, much less know that they infringed the law. He referred me to *Budenberg* v. *Roberts*, 1 C.P. 579; *Canada Sugar Company* v. *The Queen* (1899) A.C. 735; and the definitions in the Customs Act of 1859, while Mr. Storr, Counsel, referred to the definition of "import' in the Registration of Imports and Exports Ordinance (Chapter 41).

I think that in accepting the draft and sending his servant to take delivery of the goods which he knew he had not ordered—it is unnecessary to decide whether the absence of such knowledge would make any difference—he sufficiently ratified the action of Matsuoka and accepted the consignment and so became an importer.

A presumption of guilt therefore arises and the onus is on the accused to shew that he should not be punished by proving that:—

(a) having taken all reasonable precautions against committing an offence under this section, he had, at the commission of the alleged offence, no reason to suspect the genuineness of the mark; and

(b) on demand made by or on behalf of the prosecution, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(c) otherwise he had acted innocently.

Dr. Withers Payne argued that the learned District Judge only considered (a) and (b) about reasonable precautions and omitted consideration of (c) altogether.

The reason for convicting appears to have been because he did not go down to the wharf or send a responsible person to inspect the said goods.

I think from the evidence that he sent Ling An. I agree that a coolie can hardly be described as a responsible person but if appellant had gone himself what difference would it have made? He would not have been allowed interference with the cases until he produced the bill of lading, he could not get the bill of lading until he accepted the draft. Before delivery was physically taken the cases were opened. Had he gone himself he would have seen some person open the cases for examination, and then and only then would he see their contents. What precaution could he have taken at that stage? The evidence, which is meagre, suggests that the cases were opened and detained as soon as the coolie presented the bill of lading to get delivery and it is difficult to see what precaution he could have taken.

Mr. Storr argued that if reasonable precautions were not taken the appellant cannot have "acted innocently." That argument does violence to the section. (a) and (b) is one defence, (c) is another distinct defence. If "taking precautions" is an essential ingredient of (c) then (a) is nothing more than a definition or illustration of "acted innocently.' The argument entirely ignores the fact that (a) and (b) are joined by "and" and separated from (c) by "or" and that (c) commences with the word "otherwise."

It is clear that an accused person who sets himself to prove (c) need not also prove (a).

Identical clauses had to be considered in *Allard* v. *Selfridge & Co.*, (1925) 1 K.B. Lord Hewart; C.J., said at p. 133.

> "What defences are open to the defendant? There is a clear division of a two-fold nature; the defendant may prove the matter contained in paras. (a) and (b), which are united by the conjunction "and"; but apart altogether from those paragraphs, he may prove para. (c), the language of which is not "that he had acted innocently," but "that otherwise he had acted innocently"; in other words there is the clearest possible dichotomy. If the defendant proposes to prove that which is contained in paras. (a) and (b) that is one line of defence, but if the cir cumstances are such that while his defence is of that nature it is built upon materials that are incomplete, he cannot have recourse to para. (c) for the purpose of establishing a portion of that which is alleged in paras. (a) and (b). To hold the contrary would be destructive of this part of the section and would involve what appear to me to be at least two absurdities; first, it would involve the conclusion that paras. (a) and (b) contain a mere illustration of the kind of defence which may be put forward, and secondly, that the word "otherwise" is to be omitted from para. (c)."

Allard v. *Selfridge & Co.*, was an appeal by way of a case stated from a decision of a magistrate dismissing an information against Messrs. Selfridge & Co., Ltd., for selling goods to which a false trade description had been applied. Messrs. Selfridge had sold as silk some stockings which were made of artificial silk. But the magistrate found that the buyer had bought these stockings as silk from a merchant in a comparatively small way of business, not previously known to her without applying familiar tests. He therefore held that the buyer had not taken all reasonable precautions, but that she had acted in perfectly good faith, and therefore innocently, and that the defendants had the benefit of her innocence.

The passage of Lord Hewart's judgment which I have cited is an amplification of Sir Duncan Kerley's argument that a b—x does not equal c.

Mr. Storr supported his argument by citing *The King* v. *Ewe Kai Cheah*, (1926) S.S.L.R. 156. He referred to Sir William Murison's judgment at p. 161 'What precautions respondent could have taken is hardly for me to say though I think he might have informed some Government officer. If he had done anything at all, I would not have been disposed to say that there should have been a conviction. But he did in fact absolutely nothing. With regard to the defence that the respondent acted innocently the remarks of Salter J. in *Allard* v. *Selfridge* put the position succinctly and clearly. Having failed to prove (a) in s. 21 he must be convicted unless he can prove that there was no intention to sell soap guaranteed to contain not less than 20% of pure carbolic acid. This is not, and could not be, contended." With this Judgment Reay J., concurred.

There is a passage in the judgment of Brown J. (*Ibid*, 164) which was cited as shewing that the learned Judge introduced the idea of precautions into the consideration of a defence under (c) but a careful perusal of the passage shews that having set out the arguments under (a) and under (c) and he proceeds to dispose of them both in one sentence and when he speaks of "precaution" he is dealing with a defence under paragraph (a) and not with one under paragraph (c).

The *King* v. *Ewe Kai Cheah* is entirely in accord with *Allard* v. *Selfridge & Co.* Ewe Kai Cheah was charged under s. 21 with importing. selling, exposing, or having in possession for sale soap with a false trade description. He took no precaution, therefore a defence under (a) failed. He unquestionably had the soap for sale, therefore a defence under (c) failed though he did not know that the description was false.

The facts in the present appeal are very different. If the appellant's story is true, he had no reason to suspect. He never had the goods in his physical possession. Up to the time of the seizure it is not easy to imagine what opportunity he had of taking "reasonable precaution." It is unlikely that either the Bank or the Government authorities would have permitted him to open the cases until he had accepted delivery and assumed responsibility to Matsuoko & Co., for the goods. He might of course have written to Matsuoko asking few particulars of the trade marks (if any), trade description (if any), and all the other matters which might result in the import being banned. I do not think it would be reasonable to require such a precaution, nor do I think that such precaution, if taken, would be a reasonable precaution.

But in importing the socks he did the thing forbidden by the statute even if he had no fraudulent or dishonest intent.

However, the Legislature has provided two methods by which he may escape punishment, one being that he "acted innocently" and these words do not imply that he took precautions nor does he bring himself within them of proving that he had no fraudulent or dishonest intent.

Under what circumstances then can a defence under (c) be established?

Lord Coleridge in *Stone* v. *Burn*, (1911) 1 K.B. 933 says "such innocence can only exist when the infraction was committed by inadvertence or mistake of fact. Here the appellant knew all the facts—his only mistake was as to the effect of the statute." But mistake of fact does not include such a mistake as *bona fide* belief that artificial silk stockings are made of real silk or that Japanese socks do not bear an English trade mark.

Stone v. *Burn* like *Allard* v. *Selfridge* was a case under an English section which involved the defendant having physical possession of the offending article and therefore opportunity to take precaution. The section in the Colony Ordinance, however, covers "imports," a word which is not in the English section, and a person may import but nevertheless fail to secure physical possession by reason of the article being seized by Government officers before it comes into his pnysical possession. The Ordinance intends that there should be two possible defences to a person who imports. It was very difficult to take precautions. In the English cases and in *Ewe Kai Cheah* v. *Rex* it was not impossible. If therefore "otherwise acted innocently" as applied to importing when the accused does not get physical possession is to be restricted to acting inadvertently, neither defence would be available for I do not see how inadvertence can arise.

I find it difficult to imagine how an importer who does not get possession can ever have any defence such as the legislature intends him to have if in such a case "acted innocently" is to be confined to an act of inadvertence. On the other hand it seems to me to be impossible to give clause (c) one interpretation when applied to the word "imports" and an entirely different interpretation when applied to the next three verbs in the same section.

I am therefore of opinion that assuming the appellant's story to be true he had brought himself within neither (a) nor (c).

The learned District Judge does not appear to have considered whether the appellant's story that he had not ordered these socks and did not know they bore a trade mark was true, and if the view which I have reluctantly taken is correct it was unnecessary for him to have considered it. I add this because I do not suppose that the District Judge intended to imply by the opening words of his grounds for judgment that he rejected the appellant's evidence just because other accused persons in other cases unsuccessfully put up the same statutory defences.

I dismiss the appeal.

Appeal dismissed.

Solicitors for appellant:—*Drew & Napier.*

[ORIGINAL CIVIL JURISDICTION]

McELWAINE, C.J.

January 29, 1938.

TAN TENG (m.w.) v. S. S. T. K. R. KARUPPAN CHETTIAR.

[SINGAPORE SUIT No. 67 of 1937.]

Writ of Seizure and Sale—Damages for wrongful seizure and detention—Proof of malice and of want of reasonable and probable cause unnecessary.

The defendant obtained a writ of seizure and sale against the goods and chattels of a judgment debtor and he instructed the bailiff to seize certain property which he thought was the property of the judgment debtor but which in fact was the property of the plaintiff a person against whom there was no judgment. The writ of seizure and sale did not authorise the seizure of the plaintiff's goods.

Held, that it was unnecessary that the plaintiff should prove malice and want of reasonable and probable cause, the wrongful seizure being itself an actionable trespass.

Chop Chye Hin Chong v. *Ng Yeok Seng*, (1934) M.L.J. 265 distinguished.

ACTION.

M. Mitter for plaintiff.

Tampoe-Phillips for defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

MCELWAINE, C.J.—This is an action for damages for the seizure and detention of a twakoh, the property of the plaintiff.

The defendant had obtained a writ of seizure and sale against the goods and chattels of a judgment debtor and he pointed out to the bailiff four twakohs which he thought were the property of the judgment debtor. The bailiff seized the four twakohs, one of which was the property of the plaintiff, a person against whom there was no judgment. The writ did not authorise the seizure of her goods.

I reserved my decision as Mr. Tampoe Phillips argued that the plaintiff had no cause of action in the absence of proof of malice and want of reasonable and probable cause and cited in support a case of *Chop Chye Hin Chong* v. *Ng Yeok Seng*, 3 M.L.J. 265.